No. 86-658

(2)

**IN THE SUPREME COURT
OF THE UNITED STATES**

RAYMOND G. BADER, JIMMY N. HALE, PHILLIP M. SANDERS, and JOESPH C. WAGNER,,

Petitioners,

V.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent.

SUPPLEMENTAL APPENDIX

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EDITOR'S NOTE

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
RAYMOND E. BADER, et al,	*	Decision No: See Attachment A
Appellants,	*	
	*	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION	*	Date: Jan 13, 1983
Agency.	*	

INTRODUCTION

By separate petitions, the appellants submitted timely appeals to the Atlanta Regional Office of the Merit Systems Protection Board. The appeals are from administrative actions taken by the Federal Aviation Administration (FAA) which resulted in the removal of each appellant from the position of Air Traffic Control Specialist at the Air Traffic Control Tower, Memphis, Tennessee.

Because the issues are substantially the same, the appeals have been consolidated. 5 U.S.C. § 7701(f)(1); 5 C.F.R. § 1201.36 (a)(1). Each appellant requested a hearing and a hearing on the consolidated appeals was held on October 18, 19, 20 and 21, 1982 at Memphis, Tennessee. [1]

JURISDICTION

At the time of the removal action, each appellant was an employee as defined by 5 U.S.C., § 7511 (a)(1)(A) and a removal is an action covered by 6 U.S.C. § 7512. Accordingly, the appeals were accepted for adjudication on the basis that they are within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. § 7513(d) and 5 U.S.C. § 7701.

FINDINGS OF FACT AND CONCLUSION

The burden of proving the charges on which an adverse action is based rests with the agency taking such action and the agency decision must be supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 U.S.C. § 1201.56(a)(ii). This standard must be applied to every element of proof of the agency's case. See In re: William F. Van Sciver, 1 MSPB 94 (1979). The Agency must establish

that the action was taken for such cause as will promote the efficiency of the service and that the disciplinary sanctions imposed are for reasons releva t to this standard. Douglas v. Veterans Administration, MSPB Dkt. No. ATO75299006 (April 10, 1981). The appellants have the burden of proof with respect to any affirmative defenses described in 5 U.S.C. § 7701(c)(2). See 5 C.F.R. § 1201.56(b).

Each appellant was advised in a written notice of his proposed removal, based on the following reasons:

> Reason 1: Violation of 5 U.S.C. § 7311 which states in pertinent part, "an individual may not accept or hold a position in the Government of the United States if he . . . participates in a strike

> against the Government of the United States . . . " and 18 U.S.C. § 1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
>
> Reason 2: Unauthorized absence.

In a specification set out under Reason 1, the agency noted that beginning at approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers occurred, noted the time and date each first failed to report for duty; and concluded that because each appellant had failed to report for his scheduled tour of duty or or before August 3, 1981, to the date of the notice that employee participated in a strike against the United States.

In a specification set out under Reason 2, each appellant was advised

of the time and date his unauthorized absence commenced based on his failure to report for his scheduled tour of duty. The specification noted that each had be sent a notice that an illegal strike was in progress and that he must return for duty; but that each failed to return to duty. 2 The Board has taken official notice

(subject to refutation) of the fact that a strike called by the now decertified Professional Air Traffic Controllers Organization (PATCO) commenced on August 3, 1981, and continued through August 6, 1981, and that the strike was illegal. Ketchem v. Department of Transportation, MSPB Dkt. No. DA075281F0713 (May 28, 1982).

In support of the charges concerning each appellant, the agency furnished copies of facility sign-in logs, shift

assignment sheets, and time and attendance records reflecting, in pertinent part, that each appellant was scheduled for a shift assignment or assignments during the period of August 3, 1981 through August 6, 1981, but that the appellants failed to report for a shift assignment or assignments during that period of time.

The appellants have not refuted the fact of the strike as officially noticed by the Board in Ketchem, supra. In light of the appellants' undisputed absences from scheduled shift assignments during the period of August 3, 1981 through August 6, 1981, I find that such absences constitute prima facie evidence of the appellants' voluntary participation in the strike. Thus, the burden of persuasion now shifts to the

appellants to rebut the agency's case by presenting evidence showing a lack of knowledge as to the existence of the strike or that their absence was due to some reason other than intentional participation in the strike. Schapansky v. Department of Transportation, MSPB Dkt. No. DA075281F1130 (October 28, 1982).

Facility Chief William W. Parker testified that as a result of a Presidential decree (Agency Hearing Exhibit No. 6), striking employees were allowed to return to work if they reported for their first scheduled shift on or after 11:00 a.m. EDT on August 5, 1981. Parker also testified that employees were briefed in late May and early June 1981 regarding a letter from FAA Administrator Helms about the illegality of a strike;

briefed again on approximately June 15, 1981 that striking was illegal and that if a strike occurred, all leave was cancelled; and that notices 3 were issued and posted in required reading locations and on bulletin boards, on July 29 and 30, 1981, with attendant supervisory briefings, notifying employees that all leave was cancelled in the event of a strike. Parker's testimony concerning the briefings and bulletins was unrebutted by the appellants.

That each appellant failed to report for the shift assignment as set out in his notice of proposed removal and that each remained absent through the time and date of his or her agency determined deadline is undisputed. Further, the evidence, as reflected in the testimony of Parker, reveals that none of the appellants contacted the facility for a shift assignment or

reported for duty prior to the deadline afforded striking employees as the result of the Presidential decree.

The undisputed evidence also shows that while some appellants attributed their absences to being on approved leave, most offered no explanation for their absences. Because of the briefings and notices to employees that leave was cancelled in the event of a strike, I conclude that the appellants knew, or reasonably should have known, of their responsibility to report for work or, to contact the facility in the event of a strike. The appellants who contend that leave was an issue either admitted, in their responses to interrogatories (Agency Hearing Exhibit No. 10), that they were aware a strike commenced on August 3, 1981, or were among the

number of controllers observed picketing during the first days of the strike. Thus, the undisputed evidence shows that each of the appellants was aware of the strike.

Although the appellants argue that Parker was without authority to cancel leave, I conclude otherwise. Because of the operational emergency brought about by the strike, in which a majority of the employees failed to report for scheduled shift assignments, it was within the agency's authority to cancel previously approved leave, in order to alleviate the disruptive effect on the agency's ability to meet its responsibility for aviation safety.

While the evidence shows that agency guidelines and advice concerning deadlines may have been interpreted

differently by various facility chiefs, the evidence shows that each facility chief equitably applied the guidelines at his facility. Thus, the fact that the Jackson, Mississippi Facility Chief determined that employees' deadlines occurred after any previously approved leave had expired does not mean that other facility chiefs were required to adopt that policy.

Appellant Harry D. Sutton asserted that he was unable to work during the period of August 4 to August 8, 1981 because he was under the care of a dentist and was taking prescription drugs during that time.

The agency established August 5, 1981 at 3:00 p.m. as Sutton's deadline for reporting to work. 4 Area Manager

James J. Quinn testified that he observed Sutton picketing on August 6, 1981 (T. 670). Sutton did not testify at the hearing but furnished, as a post-hearing submission, a January 4, 1983 affidavit by Harold G. Stratton, D.D.S. Stratton advised, in pertinent part, that on July 4, 1981, he prescribed Ananase 100 (an anti-inflammatory to reduce swelling) and Keflex 5090 (an antibiotic which is a penicillin substitute). However, Stratton did not advise that the appellant's condition or medication incapacitqted him from performing controller duties. Significantly, in his oral and written responses furnished to the agency, the appellant provided no explanation for his failure to report for his August 5, 1981 shift assignment. Nor did the appellant raise any medical claims in his initial appeal to the Board.

Further, there is no evidence or argument that the appellant sought sick leave for August 5, 1981. Accordingly, I find that the evidence presented does not support Sutton's claim of incapacitation.

The appellants argue that they considered themselves terminated as of 11:00 a.m. on August 5, 1981, based on the President's August 3, 1981 message. The appellants also claim that the agency was remiss in failing to notify them of an extended deadline to return to work as a result of the Presidential "amnesty" or that there was confusion concerning deadlines.

Any reporting deadline confusion by the appellants could have been avoided or resolved by reporting to or

contacting the facility by 11:00 a.m. on August 5, 1981, if the appellants in fact perceived that to be their reporting deadline; however, none of the appellants elected to pursue such a course of action. While the agency did not communicate to each appellant his specific deadline which was based on its liberal construction and application of President Reagan's 48-hour "amnesty", the agency was under no obligation to convey that information. It was not the agency's responsibility to seek out and attempt to persuade each appellant to report for work. Thus, I find that those appellants who now contend that they failed to report for duty because of a confusion about a deadline, if there was in fact confusion, did so as the result of their own irresponsibility and not the result of any agency nonfeasance.

Based on the appellants' established unauthorized absences and the prima facie case of strike participation which the appellants have not successfully rebutted, I find that the preponderance of the evidence supports the charges. Because the evidence discloses that once an employee missed his reporting deadline, the employee was not, or would not be permitted to return to duty, absent an acceptable excuse for being absent, I conclude that the chargeable unauthorized absence and strike particpation extended only through the deadline for each employee.

The appellants contend tha the agency committed certain procedural errors. An agency's decision may not be sustained if it is shown that harmful

error in the application of the agency's procedures at arriving at such a decision occurred. 5 U.S.C. § 7701(c)(2)(A). The burden is upon an appellant to establish, as an affirmative defense, that there was error and that it was harmful. Parker v. Defense Logistics Agency, 1 MSPB 489, 492 (1980). Harmful error is defined in the Board's regulations at 5 C.F.R. § 1201.56(c)(3) as "error which might have caused the agency to reach a conclusion different than the one reached." In deciding whether such error rises to that standard, the Board found that it is helpful to consider:

> "whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, the decisive factors are the closeness of the agency's decision, the centrality of the issue

> affected by the error, and any steps taken to mitigate the effect of the error." Id. at 493.

The appellants first claim that they were improperly denied 30 days' advance notice of the proposed removal actions. The law provides that an employee against whom an action is proposed is entitled to at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Because 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because the appellants were absent without authorization or notice from work during the strike, the agency had reasonable cause to believe the appellants had committed a crime for

which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified and I find no error with respect to this matter. Schapansky, supra, at 8.

The appellants furnished no evidence in support if their claim that statutes prohibiting strikes by federal employees are unconstitutional and the Board has concluded otherwise. Ketchem, supra, at 5, with pertinent case law citations at footnote 12.

The appellants also contend that they were improperly denied a minimum of 7 days in which to orally respond to the charges. An employee against whom an adverse action is proposed is entitled to a reasonable time, but not less than 7 days, to answer orally and in

writing and to furnish affidavits and other documentary evidence in support of the answer. 5 U.S.C. § 7513(b)(2).

A review of the record reveals that in most cases, oral responses by the appellants were heard by the agency official on the seventh day or later, after receipt of the notice of proposed removal. In Parker, supra, at 492, the Board, in keeping with Congressional intent as to when procedural error is to be considered to be reversible error, found that the statute clearly places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful.

In Ratley v. Department of the Army, MSPB Dkt. No. AT07528110338 at 5,

(September 17, 1982), the Board held as follows:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonble and violates the requirements mandated by statute and is thus not in accordance with law. (footnote omitted.

Ratley can be read as holding that less than seven days to reply to an advance notice is per se harmful procedural error because seven days is mandated by law. Upon examination of the law and Board Orders, however, Ratley stands as inconsistent. Nowhere in the law are procedural errors reversible errors because they are "not in accordance with the law."

It is the agency's decision to take disciplinary action that cannot be sustained by the Board if it is not in accordance with law. 5 U.S.C. § 7701(c)(2)(C). Within that same section of the statute, Congress provides that agency decisions cannot be sustained if the appellant shows harmful error in procedures used to effect the action. 5 U.S.C. § 7701(c)(2)(A). If errors in procedures mandated by statute are considered harmful per se, absurd results could ensure. For example, when an agency does not give an employee specific reasons for an imposed disciplinary action, but the record shows that the appellant was aware of the reasons for the discipline, or if an agency gives an employee only 29 days rather than the

statutorily mandated 30 days' advance notice. Cf. Cade v. U.S. Postal Service, MSPB Dkt. No. SF07528010370 (November 30, 1981) (the Board found that a failure to afford the appellant the full period of time required is not reversible error absent a showing of harmful error by the appellant); Gallego v. Department of the Navy, MSPB Dkt. No. SF07528110759 (July 21, 1982) (shortening the notice period by seven days was error but that it did not warrant reversal of the removal action under 5 U.S.C. § 7701(c)(2)(A).

While twenty nine of the appellants plead harmful error with respect to the fact they received less than seven days to make an oral reply, they have not shown harm. Accordingly, I find that any shortened oral response period had no effect on the agency decision and, therefore, conclude that

such does not constitute harmful error.

The next claim of harmful error made by the appellants is that they were unlawfully suspended during the pendency of the removal actions. The agency acknowledged that the appellants were placed in a non-duty and non-pay status during the notice period.

A "suspension" is defined as the placing of any employee in a temporary status without duties and pay for disciplinary reasons. 5 U.S.C. §§ 7501(2) and 7511(2). It is apparent that the agency considered it contrary to its best interest to return the appellants to a duty status during the notice period. However, the agency

has offered no explanation for failing to retain the appellants in accordance with the procedures set out in 5 U.S.C. § 7513 which includes, inter alia, an advance written notice and a right to reply to the proposed action. It is clear from the record that the agency did not furnish the appellants with a notice of proposed suspension nor furnish them with an opportunity to reply thereto. Accordingly, I find that the agency's de facto suspension actions were effected without regard for the requirements of 5 U.S.C. § 7513 and, therefore, cannot be sustained.5 See Cuellar v. U.S. Postal Service, MSPB Dkt. No. SF075299045 (November 13, 1981).

The appellants also contest the fact that they were denied requests for extensions of time in which to provide

their responses to the proposed removal actions, but provided only speculation of harmful error in that regard. Thus, the appellants have failed to carry the burden of proof with respect to the claim of harmful error in connection with that matter. Nevertheless, on my review of the record, the claims made by the appellants, and the circumstances wherein the majority of the facility's workforce was absent from scheduled shifts, I find that the appellants were afforded a reasonable time to review the material relied on to support the proposed removals and to respond to the proposed actions. Accordingly, I find no error with respect to the agency's decision to deny these requests for time extensions.

The appellants also claim harmful error based on the fact that their requests for certain documentary material, during and after their oral presentations, was not then provided. However, the appellants have not shown how that material, some of which had been previously furnished or made available and some of which was subsequently obtained through discovery proceedings, would have had any effect on the agency decision. Accordingly, I find no error with respect to thismatter. Even if it was error, it is now shown to be harmful.

The appellants next claim that the agency evidence concerning the charges, should have been limited, at the hearing, to that material and evidence provided prior to the hearing.

A proceeding before the Board is a de novo proceeding, and the Board may consider all the relevant evidence presented by both parties. Nothing in the law or in the Board's regulations restricts an agency to reliance upon its documentary administrative record. Ziess v. Veterans Administration, MSPB Dkt. No. NY075209017 (September 1, 1981). See also Chavez v. Office of Personnel Management, MSPB Dkt. No. DA331L09003 at 13-14 (May 28, 1981). Thus, contrary to the appellants' claim, the agency evidence of picketing activity, PATCO membership, and strike support activities constituted admissible evidence relating to strike participation.

The appellants also contend that the

removal actions were pre-determined as the result of statements by public officials, including President Reagan, that strikers would be fired. However, the evidence show that each appellant was afforded the opportunity to respond to the charges against him, but that few furnished any explanation for their absences. The evidence, as reflected by the testimony of Parker, reveals that individual consideration was given to each appellants' case and that Parker had the authority to decide each case based on individual circumstances. Thus, the appellants' assertion that the actions were pre-determined is not supported by the evidence presented.

The appellants contend that the agency actions against them constituted a prohibited personnel practice, specifically claiming that they were

treated unequally when certain employees were allowed to return to work, because of varying deadlines. However, the appellants have not pointed out any instance where similarly situated employees were treated differently, i.e., there is not evidence showing that any employees not taking advantage of the Presidential "amnesty" were allowed to return to work. Thus, the appellant's have failed to show unequal or disparate treatment.

Contrary to the appellants' claim, the evidence presented does not reveal the removal actions were a violation of the Merit System principles set out in 5 U.S.C. § 2301. Any failure of the agency to consider appellants' work performance, ability, aptitude, and general qualifications, is of no

consequence since those matters are irrelevant to the charges on which the removal actions were based. The appellants also claim that the removal actions were taken against them as reprisal for their disclosure of violations of laws, rules, and regulations, mismanagement, gross waste of funds; abuse of authority; and substantial danger to public safety. However, the evidence, as revealed in the testimony of agency officials, discloses the sole reasons for the removal actions were as set out in the letters of proposed removal, specifically, AWOL and strike participation. Accordingly, I find no merit in the appellants' claim of reprisal.

The appellants also claim that the agency prohibition against their reemployment with the agency and their

inability to compete with others for employment because of the stigma of their removal, constitutes a prohibited personnel practice; however, those matters are not subject to my review in this decision. Contrary to the appellants' assertion, I find that any subsequent settlement of appeals concerning other former air traffic controllers removed for striking and AWOL is irrelevant to the issues in the instant appeals.

Nexus may be presumed where there is a "clear and direct relationship" between such misconduct and both the "employees ability to accomplish his...duties satisfactorily" and "the agency's ability to fulfill its mission." Doe v. Hampton, 566 F.2d 265, 272, n. 20 (D.C. Cir. 1977); see

also, Bonet v. U.S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981).

Because of the intentional disruptive effect of the strike on the agency mission, caused by the appellants' absences in support of a strike, I find no basis for mitigating the penalty of removal, notwithstanding the appellants' prior favorable employment record.

Removal of an air traffic controller for proven participation in a strike against the Federal government is an appropriate penalty and promotes the efficiency of the service. Johnson v. Department of Transportation, MSPB Dkt. No. DC075281F0998 at 16 (November 10, 1982); Schapansky, supra, at 10-11. Since removal is found to be appropriate in these cases, it is unnecessary for me to determine the

correctness of the agency's assertion that removal of a striking employee is mandated by statute.

DECISION

The removal actions are AFFIRMED. The agency is ORDERED to amend the records to show each appellant in a pay status from the date of the notice of proposed removal through the effective date of the removal action.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 17, 1983, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed;

(b) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1)[6], the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

S. F. VESSER
Presiding Official

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

IN THE MATTER OF:	*	
	*	
RAYMOND E. BADER, ET AL,	*	
	*	DECISION NUMBER:
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	*	Date:
	*	Jan. 13,1983
V	*	
	*	
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,	*	
	*	
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INTRODUCTION

By separate petitions, the appellants submitted timely appeals to the Atlanta Regional Office of the Merit Systems Protection Board. The appeals are from administrative actions taken by the Federal Aviation Administration (FAA) which resulted in the removal of each appellant from the position of Air Traffic Control Specialist at the Air Route Traffic Control Center, Memphis, Tennessee.

Because the issues are substantially the same, the appeals have been consolidated. 5 U.S.C. § 7701(f)(1); 5 C.F.R. § 1201.36(a)(1). Each appellant requested a hearing and a hearing on the consolidated appeals was held on October 18, 19, 20, and 21, 1982, at Memphis, Tennessee.[1]

JURISDICTION

At the time of the removal action, each appellant was an employee as defined by 5 U.S.C. § 7511(a)(1)(A) and a removal is an action covered by 5 U.S.C. § 7512. Accordingly, the appeals were accepted for adjudication on the basis that they are within the appellate jurisdiction of the Merit Systems Protection Board. 5 U.S.C. 7513(d) and 5 U.S.C. § 7701.

FINDINGS OF FACT AND CONCLUSIONS

The burden of proving the charges on which an adverse action is based rests with the agency taking such action and the agency decision must be supported by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B); 5 C.F.R. § 1201.56(a)(ii). This standard must be applied to every element of proof of the agency's case. See In Re: William F. Van Sciver, 1 MSPB 94 (1979). The agency must establish that the action was taken for such cause as will promote the efficiency of the service and that the disciplinary sanctions imposed are for reasons relevant to this standard. Douglas v. Veterans Administration, MSPB Dkt. No. AT075299006 (April 10, 1981). The appellants have the burden of proof with respect to any affirmative defenses described in 5

U.S.C. § 7701(c)(2). See 5 C.F.R. § 1201.56(b).

Each appellant was advised in a written notice of his proposed removal, based on the following reasons:

> Reason 1: Violation of 5 U.S.C. § 7311 which states in pertinent part, "an individual may not accept or hold a position in the Government of the United States if he ...participates in a strike against the Government of the United States..." and 18 U.S.C. § 1918 which makes participation in a strike against the Government of the United States a crime for which a sentence of imprisonment can be imposed.
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> Reason 2: Unauthorized absence.

In a specification set out under Reason 1, the agency noted that beginning at approximately 7:00 a.m. EDT, on August 3, 1981, a nationwide strike by air traffic controllers

occurred; noted the time and date each first failed to report for duty; and concluded that because each appellant had failed to report for his scheduled tour of duty on or after August 3, 1981,to the date of the notice, that employee participated in a strike against the United States.

In a specification set out under Reason 2, each appellant was advised of the time and date his unauthorized absence commenced based on his failure to report for his scheduled tour of duty. The specification noted that each had been sent a notice that an illegal strike was in progress, and that he must return for duty; but that each failed to return to duty.[2] The Board has taken official notice (subject to refutation) of the fact that a strike called by the now decertified Professional Air Traffic

Controllers Organization (PATCO) commenced on August 3, 1981, and continued through August 6, 1981, and that the strike was illegal. Ketchem v. Department of Transportation, MSPB Dkt. No. DA075281F0713 (May 28, 1982).

In support of the charges concerning each appellant, the agency furnished copies of agency personnel logs (facility sign-in sheets) and Memphis Tower Personnel Schedules reflecting, in pertinent part, (for the period of August 3, 1981 through approximately August 11, 1981) that each appellant was scheduled for a shift assignment or assignments during that period of time, but that each failed to report for his or her shift assignment.

The appellants have not refuted the fact of the strike as officially

noticed by the Board in Ketchem, supra. In light of the appellant's undisputed absences from scheduled shift assignments during the period of August 3, 1981 through August 6, 1981, I find that such absences constitute prima facie evidence of the appellants' voluntary participation in the strike.[3] Thus, the burden of persuasion now shifts to the appellants to rebut the agency's case by presenting evidence showing a lack of knowledge as to the existence of the strike or that their absence was due to some reasons other than intentional participation in the strike. Schapansky v. Department of Transportation, MSPB Dkt. No. DA075281F1130 (October 28, 1982).

Facility Chief Phillip L. Lofton testified that as a result of a

Presidential decree (Agency Hearing Exhibit No. 6), striking emloyees were allowed to return to work if they reported for their first scheduled shift on or after 11:00 a.m. EDT on August 5, 1981. Lofton also testified that prior to the strike, all employees were advised in briefings by team supervisors and in briefings he conducted, that participation in a strike against the Government was proscribed activity and that, in the event of a strike, all leave would be cancelled. (Tr. 103-104). Lofton added that on July 27, 1981, Facility Order No. 7110.60, the Memphis Tower Job Action Plan (Agency Exhibit No. 11 and also included under Tab 13 of the file furnished by the agency regarding each appellant) was issued, distributed, and posted, as required reading by all

employees. He added that supervisors also briefed employees concerning the requirements of that Facility Order, notified employees that in the event of a job action [strike], all leave would be cancelled and that employees would be expected to contact or to report to the facility immediately, regardless of past schedules or regular days off (RDO'S).

Lofton testified that all but three appellants (Hale, Ross, and Williams) were briefed on Facility Order No. 7110.60 and that because those three had not been briefed on the Order the provisions of the Order were not applied to them.

That each appellant failed to report for the shift assignment as set out in his notice of proposed removal and

that each remained absent through the time and date of his or her agency determined deadline is undisputed. Further, the evidence, as reflected in the testimony of Lofton, reveals that none of the appellants contacted the tower or reported for duty prior to the deadline afforded striking employees as the result of the Presidential decree. The undisputed evidence also shows that none of the appellants, except Collins, Hale, Sanders, Welch, and Wagner, offered any explanation for their absences. Other appellants did claim in their February 24, 1982 submissions which included affirmative defenses, that leave during the week of August 3 was an issue, but furnished no evidence in support of that contention.

Because of the operational emergency

brought about by the strike, in which a majority of the employees failed to report for scheduled shift assignments, it was within the agency's authority to cancel previously approved leave, in order to alleviate the disruptive effect on the agency's ability to meet its responsibility for aviation safety.

With respect to appellant Collins, the uncontroverted evidence shows that he failed to report for scheduled shifts on August 3, 4, and 5, 1981, but that because his first scheduled shift after the Prsidential deadline did not commence until August 8, 1981, he had until that date to report. The unrefuted evidence also shows that Collins had previously scheduled annual leave for August 8, 1981, but that on July 28, 1981, he had been

notified in a supervisory briefing on Facility Order No. 7110.60 that in the event of a job action, any approved leave would be cancelled. (TR. 98-99). Collins furnished no explanation for his failure to report for his August 3 through August 5, 1982 assigned shifts. Further, because of Facility Order No. 7110.60, the appellant knew, or should have known, that any approved leave had been cancelled.

With respect to appellant Hale, the evidence shows that he originally had approved annual leave and regular days off from July 17, 1981 through August 9, 1981. The evidence also shows that because Hale was absent on approved leave at the time of the issuance of Facility Order No. 7110.60 and the briefing on that Order, he was allowed

until August 10, 1981 to report for work (his next regularly scheduled shift) but that he failed to report on that date. Accordingly, Hale was charged with unauthorized absence and strike participation commencing August 10, 1981.

Lofton testified (Tr. 259-260) that based on his review of notes of telephone calls to the facility, Hale telephoned on August 7, 1981; talked with Deputy Chief Schasser who requested the appellant to report for work on August 10; that the appellant gave an affirmative response to Schasser's request; and that the appellant was notified that he was considered AWOL and a strike participant.

Hale testified that while he was on a

camping trip he learned of the strike. He acknowledged that he telephoned and talked with Schasser on August 7, 1981 but denied that Schasser told him to report for work on August 10, 1981; and, at the hearing, for the first time, claims that his failure to report on August 10, 1981 was because Schasser told him in the August 7 telephone conversation that the appellant's termination papers were being processed. Because the appellant had not previously raised the issue of deception and misinformation with the agency, in his petition of appeal to the Board, or as an affirmative defense in compliance with the Board's February 4, 1982 Order requiring that such claims be filed with the Board by February 25, 1982, I find that the appellant's explanation lacks credibility. The

appellant acknowledged that Schasser told him he could come in on August 10, 1982, and talk, but furnished no explanation why he did not take advantage of such an offer. I find this incredible in light of the fact that the appellant essentially claims he was not a striker.

The appellant was scheduled to work on August 10, 1981 following the expireation of his approved leave, but did not report. The appellant does not contend that Schasser told him he could not report for work on August 10, 1981. In my view, the more credible explanation is that Hale's absence, commencing on August 10, 1981, was in support of the strike, and I so find. Appellant Sanders was charged with AWOL and strike participation commencing at 1:00 p.m.

on August 3, 1981. The evidence, concerning Sanders, reflects that he had leave scheduled for August 3 and 4, 1981, but that as a result of the strike, Sanders' leave was automatically cancelled in accordance with Facility Order 7110.60. In his response to agency interrogatories, Sanders acknowledged that on August 3, 1981, he was aware that a strike was in progress. Lofton's testimony that Sanders was briefed on Facility Order 7110.60 was not disputed by Sanders. Accordingly, Sanders knew, or should have known, that his leave was cancelled and of his obligation to report for work or contact the facility.

Appellant Welch (whose agency-determined deadline was August 6, 1981, at 3:15 p.m.) was charged

with AWOL and strike participation commencing at 6:45 a.m.. on August 3, 1981. In his response to the notice of proposed removal, Welch claims that he had approved annual leave and regular days off from August 4 through August 12, 1981, but furnished no explanation for his August 3 absence, nor did he furnish any explanation concerning August 3 in his statement of issues, facts and affirmative defenses which was filed in response to the February 4, 1982 Order by the Board's Atlanta Regional Office. It is noted that in his May 27, 1982 response to agency interrogatories, (which was submitted by the agency) the appellant claimed that he was scheduled for a familiarization flight [4] on August 3, 1981. However, the evidence does not show, and the appellant does not claim, that he took

a familiarization flight on that date. Thus, Welch's August 3 absence from work is unexplained. Further, the undisputed evidence reflects that that appellant was briefed on Facility Order No. 7110.60 and, therefore, knew, or should have known, that his annual leave commencing on August 4, 1981 was cancelled.

Appellant Wagner was charged with AWOL and strike participation commencing at 11:00 p.m. on August 4, 1981. Wagner's agency-determined deadline was August 8, 1981, at 4:00 p.m. The evidence, with respect to Wagner, reveals that he had annual leave scheduled for August 3, 1982, but as a result of Facility Order No. 7110.60, that leave was cancelled by the agency when the strike occurred. The appellant testifed that he was out of

town on August 3 and 4 and that he returned to Memphis on August 6, 1982. He claims that on August 2, 1982 he obtained approval for annual leave on August 4, 1982, but furnished no evidence to corroborate that claim. Contrary to the appellant's assertion, the agency's shift assignment schedules (watch schedules) and personnel logs do not reflect that he had obtained leave approval from his scheduled shift assignment commencing at 11:00 p.m. on August 4, 1981. The appellant acknowledged that he was aware, on August 3, 1981, that a strike was in progress but that he did not contact thefacility as directed (TR. 755-756) and that he did not attempt to return to work thereafter (Tr. 757). He acknowledged that he participated in a strike (Tr. 760) and that a facility order had

been issued cancelling leave in the event of a strike (Tr. 762).

Thus, the evidence shows that as a result of the facility order cancelling leave, the appellant's leave had been cancelled and that the appellant knew of his responsibility to report to the facility, but failed to report.

While the evidence shows that agency guidelines and advice concerning deadlines may have been interpreted differently by various facility chiefs, the evidence showed that each facility chief equitably applied the guidelines at his facility. Thus, the fact that the Jackson, Mississippi Facility Chief determined that employees' dealineš occurred after any previously approved leave had expired does not mean that other facility

chiefs were required to adopt that policy.

The appellants argued that they considered themselves terminated as of 11:00 a.m. EDT on August 5, 1981, based on the President's August 3, 1982 message. The appellants also claim that the agency was remiss in failing to notify them of an extended deadline to return to work as a result of the Presidential "amnesty" or that there was confusion concerning deadlines.

Any reporting deadline confusion by the appellants could have been avoided or resolved by reporting to or contacting the facility by 11:00 a.m. on August 5, 1982, if the appellants in fact perceived that to be their reporting deadline; however, none of

the appellants elected to pursue such a course of action. While the agency did not communicate to each appellant his specific deadline which was based on its liberal construction and application of President Reagan's 48-hour "amnesty", the agency was under no obligation to convey that information. Each appellant's absence was a matter of his individual choice. It was not the agency's responsibility to seek out and attempt to persuade each appellant to report for work. Thus, I find that those appellants who now contend that they failed to report for duty because of a confusion about a deadline, if there was in fact confusion, did so as the result of their own irresponsibility and not the result of any agency nonfeasance.

Based on the appellant's established unauthorized absences and the prima facie case of strike participation which the appellants have not successfully rebutted, I find that the preponderance of the evidence supports the charges. Because the evidence discloses that once an employee missed his reporting deadline, the employee was not, or would not be permitted to return to duty, absent an acceptable excuse for being absent, I conclude that the chargeable unauthorized absence and strike participation extended only through the deadline for each employee.

With respect to appellants Hale and Williams, I find that their chargeable absences which commenced after August 6, 1982, but while strike related activities, such as picketing

continued, also constituted strike participation because of their unauthorized absences during a period of time in which the evidence shows they could have returned and were expected to report for work because of their schedules.

The appellants contend that the agency committed certain procedural errors.. An agency's decision may not be sustained if it is shown that harmful error in the application of the agency's procedures at arriving at such a decision occurred. 5 U.S.C. § 7701(c)(2)(A). The burden is upon an appellant to establish, as an affirmative defense, that there was error and that it was harmful. Parker v. Defense Logistics Agency, 1 MSPB 489, 492 (1980). Harmful error is defined in the Board's regulations 5

C.F.R. § 1201.56(c)(3) as "error which might have caused the agency to reach a conclusion different than the one reached." In deciding whether such error rises to that standard, the Board found that it is helpful to consider:

> "whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, the decisive factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error." Id. at 493.

The appellants first claim that they were improperly denied 30 days' advance notice of the proposed removal actions. The law provides that an employee against whom an action is porposed is entitled to at least 30 days' advance written notice, unless

there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. 5 U.S.C. § 7513(b)(1). Because 18 U.S.C. § 1918 provides that participation in a strike against the United States is a felony, punishable by up to one year of imprisonment, and because the appellants were absent without authorization or notice from work during the strike, the agency had reasonable cause to believe the appellants had committed a crime for which a sentence of imprisonment might be imposed. Thus, the agency's invocation of 5 U.S.C. § 7513(b)(1) was justified and I find no error with respect to this matter. Schapansky, supra at 8.

The appellants furnished no evidence in support of their claim that statutes prohibiting strikes by The appellants also contend that they

federal employees are unconstitutional and the Board has concluded otherwise. Ketchem, supra, at 5, with pertinent case law citations at footnote 12.

were improperly denied a minimum of 7 days in which to orally respond to the charges. An employee against whom an adverse action is proposed is entitled to a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer. 5 U.S.C. § 7513(b)(2).

A review of the record reveals that in most cases, oral responses by the appellants were heard by the agency official on the seventh day or later, after receipt of the notice of proposed removal [5]. In Parker, supra,

at 492, the Board, in keeping with Congressional intent as to when procedural error is to be considered to be reversible error, found that the statute clearly places upon the appellant the burden of establishing as an affirmative defense that the agency committed procedural error and that the error was harmful.

In Ratley vs. Department of the Army, MSPB Dkt. No. AT07528110338 at 5, (September 17, 1982), the Board held as follows:

> Because 5 U.S.C. § 7513(b)(2) provides that an employee must have at least 7 days to respond to an agency charge, any shorter period of time is inherently unreasonable and violates the requirements mandated by statute and is thus not in accordance with law. (footnote omitted).

Ratley can be read as holding that

less than seven days to reply to an advance notice is per se harmful procedural error because seven days is mandated by law. Upon examination of the law and Board Orders, however, Ratley stands as inconsistent. Nowhere in the law are procedural errors reversible errors because they are "not in accordance with the law". It is the agency's decision to take disciplinary action that cannot be sustained by the Board if it is not in accordancce with law. 5 U.S.C. § 7701(c)(2)(C). Within that same section of the statute, Congress provides that agency decisions cannot be sustained if the appellant shows harmful error in procedures used to effect the action. 5 U.S.C. § 7701(c)(2)(A). If errors in procedures mandated by statute are considered harmful per se, absurd

results could ensue. For example, when an agency does not give an employee specific reasons for an imposed disciplinary action, but the record shows that the appellant was aware of the reasons for the discipline, or if an agency gives an employee only 29 days rather than the statutorily mandated 30 days' advance notice. Cf. Cade v. U.S. Postal Service, MSPB Dkt. No. SF07528010370 (November 30, 1981) (the Board found that a failure to afford the appellant the full period of time required is not reversible error absent a showing of harmful error by the appellant); Gallego v. Department of the Navy, MSPB Dkt. No. SF07528110759 (July 21, 1982) (shortening the notice period by seven days was error but that it did not warrant reversal of the removal action under 5 U.S.C. § 7701(c)(2)(A)).

While twenty nine of the appellants plead harmful error with respect to the fact they received less than seven days to make an oral reply, they have not shown harm. Accordingly, I find that any shortened oral response period had no effect on the agency decision and, therefore, conclude that such does not constitute harmful error.

The next claim of harmful error made by the appellants is that they were unlawfully suspended during the pendency of the removal actions. The agency acknowledged that the appellants were placed in a non-duty and non-pay status during the notice period.

A "suspension" is defined as the placing of an employee in a temporary

status without duties and pay for disciplinary reasons. 5 U.S.C. §§ 7501(2) and 7511(2). It is apparent that the agency considered it contrary to its best interest to return the appellants to a duty status during the notice period. However, the agency has offered no explanation for failing to retain the appellants in a pay status. A suspension of more than 14 days must be taken in accordance with the procedures set out in 5 U.S.C. § 7513 which includes, inter alia, an advance written notice and a right to reply to the proposed action. It is clear from the record that the agency did not furnish the appellants with a notice of proposed suspension nor furnish them with an opportunity to reply thereto. Accordingly, I find that the agency's de facto suspension actions were effected without regard for the requirements of 5 U.S.C. §

7513 and, therefore, cannot be sustained.[6] See Cuellar v. U.S. Postal Service, MSPB Dkt. No. SF075299045 (November 13, 1981).

The appellants also contest the fact that they were denied requests for extensions of time in which to provide their responses to the proposed removal actions, but provided only speculation of harmful error in that regard. Thus, the appellants have failed to carry the burden of proof with respect to the claim of harmful error in connection with that matter. Nevertheless, on my review of the record, the claims made by the appellants, and the circumstances wherein the majority of the facility's workforce was absent from scheduled shifts, I find that the appellants were afforded a reasonable time to

review the material relied on to support the proposed removals and to respond to the proposed actions. Accordingly, I find no error with respect to the agency's decision to deny these requests for time extensions.

The appellants also claim harmful error based on the fact that their requests for certain documentary material, during and after their oral presentations, was not then provided. However, the appellants have not shown how that material, some of which had been previously furnished or made available and some of which was subsequently obtained through discovery proceedings, would have had any effect on the agency decision. Accordingly, I find no error with respect to this matter. Even if it was error, it is not shown to be

harmful.

The appellants next claim that the agency evidence concerning the charges, should have been limited, at the hearing, to that material and evidence provided prior to the hearing.

A proceeding before the Board is a de novo proceeding, and the Board may consider all the relevant evidence presented by both parties. Nothing in the law or in the Board's regulations restricts an agency to reliance upon its documentary administrative record. Ziess v. Veterans Administration, MSPB Dkt. No. NY075209017 (September 1, 1981). See also Chavez v. Office of Personnel Management, MSPB Dkt. No. DA831L09003 at 13-14 (May 28, 1981). Thus,

contrary to the appellant's claim, the agency evidence of picketing activity, PATCO membership, and strike support activities constituted admissible evidence relating to strike participation.

The appellants also contend that the removal actions were pre-determined as the result of statements by public officials, including President Reagan, that strikers would be fired. However, the evidence shows that each appellant was afforded the opportunity to respond to the charges against him, but that few furnished any explanation for their absences. The evidence, as reflected by the testimony of Lofton, reveals that individual consideration was given to each appellant's case and that Lofton had the authority to decide each case based on individual circumstances. Thus, the appellants'

assertion that the actions were pre-determined is not supported by the evidence presented.

The appellants contend that the agency actions against them constituted a prohibited personnel practice, specifically claiming that they were treated unequally when certain employees were allowed to return to work, because of varying deadlines. However, the appellants have not pointed out any instance where similarly situated emloyees were treated differently; i.e., there is no evidence showing that any employees not taking advantage of the Presidential "amnesty" were allowed to return to work. Thus, the appellants' have failed to show unequal or disparate treatment.

Contrary to the appellant's claim, the evidence presented does not reveal the removal actions were a violation of the Merit System principles set out in 5 U.S.C. § 2301. Any failure of the agency to consider appellants' work performance, ability, aptitude, and general qualifications, is of no consequence since those matters are irrelevant to the charges on which the removal actions were based. The appellants also claim that the removal actions were taken against them as reprisal for their disclosure of violations of laws, rules, and regulations; mismanagement; gross waste of funds; abuse of authority; and substantial danger to public safety. However, the evidence, as revealed in the testimony of agency officials, reveals the sole reasons for the removal actions were as set

out in the letters of proposed removal, specifically, AWOL and strike participation. Accordingly, I find no merit in the appellants' claim of reprisal.

The appellants also claim that the agency prohibition against their reemployment with the agency and their inability to compete with others for employment, because of the stigma of their removal, constitutes a prohibited personnal practice; however, those matters are not subject to my review in this decision. Contrary to the appellants' assertion, I find that any subsequent settlement of appeals concerning other former air traffic controllers removed for striking and AWOL is irrelevant to the issues in the instant appeals.

Nexus may be presumed where there is a "clear and direct relationship" between such misconduct and both the "employees ability to accomplish his . . . duties satisfactorily" and "the agency's abitlilty to fulfill its mission". Doe v. Hampton, 566 F.2d 265, 272, n. 20 (D.C. Cir. 1977); see also Bonet v. U. S. Postal Service, 661 F.2d 1071, 1078 (5th Cir. 1981).

Because of the intentional disruptive effect of the strike on the agency mission, caused by the appellants' absences in support of a strike, I find no basis for mitigating the penalty of removal, notwithstanding the appellants' prior favorable employment record.

Removal of an air traffic controller for proven participation in a strike

against the Federal government is an appropriate penalty and promotes the efficiency of the service. Johnson v. Department of Transportation, MSPB Dkt. No. DC07528lF0998 at 16 (November 10, 1982); Schapansky, supra, at 10-11. Since removal is found to be appropriate in these cases, it is unnecessary for me to determine the correctness of the agency's assertion that removal of a striking employee is mandated by statute.

DECISION

The removal actions are AFFIRMED. The agency is ORDERED to amend the records to show each appellant in a pay status

from the date of the notice of proposed removal through the effective date of the removal action.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on February 17, 1982, unless a petition for review is filed with the Board or the Board reopens the case on its own motion.

Any party to the proceeding, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth objections to the initial decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed

with the Secretary of the Merit Systems Protection Board, 1120 Vermont Avenue,. N. W., Washington, D.C. 20419, no later than the date set forth above.

After providing an opportunity for response by other parties, the Board may grant a petition for review when it is established that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed;
>
> (b) The decision of the presiding official is based upon the erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. § 7703(b)(1) [7], the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed

with the U. S. Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20005, no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

S. F. VESSER
Presiding Official

ATTACHMENT A

Raymond G. Bader	ATO75281F1388
William R. Bice, Jr.	ATO75281F1389
William A. Boyd, Jr.	ATO75281F1391
John K. Calhoun	ATO75281F1392
Douglas A. Collins	ATO75281F1394
Walter S. Crockett	ATO75281F1395
Robert L. Currin	ATO75281F1396
Robert D. Farrar	ATO75281F1398
Paul P. Fournier	ATO75281F1399
James M. Glenn	ATO75281F1401
Glenn E. Green, Jr.	ATO75281F1402
Jimmy N. Hale	ATO75281F1403
Michael E. Holeman	ATO75281F1405
Charles W. Lepeard	ATO75281F1406
Frank L. Long	ATO75281F1407
Mark W. Massey	ATO75281F1409
Perry G. Morgan	ATO75281F1528
Roy A. Mynatt, Jr.	ATO75281F1412
John M. Naanes	ATO75281F1413
William D. Pymphrey	ATO75281F1418
D. J. Reynolds	ATO75281F1419
Leslie D. Ross	ATO75281F1421
Phillip M. Sanders	ATO75281F1422
Edwin G. Scott	ATO75281F1423
Ralph C. Sedgwick	ATO75281F1424
David C. Titus	ATO75281F1427
Joseph C. Wagner, Jr.	ATO75281F1429
Earl M. Welch, Jr.	ATO75281F1432
John W. Wilder	ATO75281F1433
Stanley R. Wilder	ATO75281F1434
Robert E. Williams	ATO75281F1435
Robert J. Young	ATO75281F1436

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

R.E. BADER, et al, (Memphis, TN ATCT & ARTCC)	*
Appellants,	*
v.	*
DEPARTMENT OF TRANSPORTATION, FEDERAL AVIATION ADMINISTRATION,	*
Agency.	*

ORDER

By a submission dated December 11, 1982, the attorney for the above-referenced appellants moved for reconsideration of the decision to deny appellants' request that the record be re-opened for the development of evidence of recent settlements of appeals by former air traffic controllers.

The motion for reconsideration is

Denied, as is the motion for certification, on the basis that the matter sought to be certified does not met the criteria for certification set out in 5 C.F.R. § 1201.92.

Ordered this 5th day of January, 1983.

S. F. VESSER
Presiding Official